68

No. (1)

Supreme Court, U.S.
FILED

07-425 SEP 25 2007

OFFICE OF THE CLERK

In The Supreme Court of the United States

CHRISTOPHER MATTHEW BROWN,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

M. Gordon Widenhouse, Jr.
Counsel of Record
RUDOLF WIDENHOUSE & FIALKO
312 West Franklin Street
Chapel Hill, NC 27516
(919) 967-4900

Counsel for Petitioner

David G. Belser
BELSER & PARKE, P.A.
Post Office Box 1076
Asheville, NC 28802
(828) 258-1500

Counsel for Petitioner

THE LEX GROUP^{DC} ♦ 1750 K Street N.W. ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦ www.thelexgroupdc.com

QUESTION PRESENTED

WHETHER THE TRIAL COURT'S REFUSAL TO GIVE PETITIONER'S REQUESTED JURY INSTRUCTION ON DURESS AS A DEFENSE TO UNINTENTIONAL MURDER AND SEVERAL UNDERLYING OFFENSES, WHERE SUBSTANTIAL EVIDENCE SHOWED THAT HE FEARED FOR HIS SAFETY WHEN HE EXCEEDED THE SPEED LIMIT AND DROVE RECKLESSLY, VIOLATED HIS DUE PROCESS RIGHT TO A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL AMENDMENT INVOLVED 3

STATE STATUTES INVOLVED 3

STATEMENT OF THE CASE 5

A. Procedural History 5

B. Factual Background 5

MANNER IN WHICH THE FEDERAL CONSTITUTIONAL QUESTION WAS RAISED AND DECIDED BELOW 8

REASONS FOR GRANTING THE WRIT 8

THE TRIAL COURT'S REFUSAL TO GIVE PETITIONER'S REQUESTED JURY INSTRUCTION ON DURESS AS A DEFENSE TO UNINTENTIONAL MURDER AND SEVERAL UNDERLYING OFFENSES, WHERE BY SUBSTANTIAL EVIDENCE SHOWED THAT HE

FEARED FOR HIS SAFETY WHEN HE EXCEEDED THE SPEED LIMIT AND DROVE RECKLESSLY, VIOLATED HIS DUE PROCESS RIGHT TO A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT 8

CONCLUSION 19

APPENDIX

Order of
The Supreme Court of North Carolina
Re: Denying Petition for
Discretionary Review
entered July 2, 2007 ..... 1A

Opinion of
The North Carolina Court of Appeals
entered March 6, 2007 ..... 3A

Excerpt of Transcript of Jury Charge before
The Buncombe County Superior Court
on September 1, 2005 ..... 13A

Requested Instruction on Duress
entered September 1, 2005 ..... 30A

TABLE OF AUTHORITIES

Page(s)

CASES

Beck v. Alabama,
447 U.S. 625 (1980) 13

Brown v. State,
227 Miss. 823, 87 So.2d 84 (1956).....9, 12, 18

Browning v. State,
31 Ala. App. 137, 13 So.2d 54 (1943).....*passim*

California v. Trombetta,
467 U.S. 479 (1984) 9, 10

Commonwealth v. Allen,
711 N.E.2d 657 (Mass. 1999) 16

Crane v. Kentucky,
476 U.S. 683 (1986) 10

Cupp v. Naughten,
414 U.S. 141 (1973) 12

Henderson v. Kibbe,
431 U.S. 145 (1977) 12

Keeble v. United States,
412 U.S. 205 (1973) 13

Lannert v. Jones,
321 F.3d 747 (8th Cir.), *cert. denied*,
540 U.S. 917 (2003) 2

Matthews v. United States,
485 U.S. 58 (1983) 12

People v. Anderson,
28 Cal.4th 767, 50 P.2d 368 (2002) 16, 17

People v. Pena,
149 Cal. App.3d Supp. 14,
197 Cal. Rptr. 264 (1983) ..... *passim*

Schad v. Arizona,
501 U.S. 624 (1991) 13

State v. Brown,
306 Or. 399,
761 P.2d 1300 (1988) 9, 12, 14, 17

State v. Messler,
19 Conn. App. 432,
562 A.2d 1138 (1989) 9, 12, 17

State v. Riedl,
15 Kan. App.2d 326,
807 P.2d 697 (1991) ..... *passim*

Stevenson v. United States,
162 U.S. 313 (1896) 12

Taylor v. Kentucky,
436 U.S. 478 (1978) ..... *passim*

United States v. Bailey,
444 U.S. 394 (1980) 10, 11, 13

United States v. Gaudin,
515 U.S. 506 (1995) 13

United States ex rel. Peery v. Sielaff,
615 F.2d 402 (7th Cir.), *cert. denied*,
446 U.S. 940 (1979) 2

CONSTITUTIONAL PROVISION

U.S. CONST. amend. XIV .....*passim*

STATUTES

28 U.S.C. § 1257(a).....3

Model Penal Code § 3.02(1) ... .10, 11

Model Penal Code § 2.09 (Comment 3) 17

N.C. Gen. Stat. § 14-17 3

N.C. Gen. Stat. § 14-32(b).....4

N.C. Gen. Stat. § 20-140(b).....4

N.C. Gen. Stat. § 20-141(3)(b) 4

N.C. Gen. Stat. § 20-146 4

OTHER AUTHORITIES

Larry Alexander,
A Unified Excuse of Preemptive Self Protection, 74 Notre Dame L. Rev. 1475 (1999) 17

Joshua Dressler,
Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits, 62 So. Cal. L. Rev. 1331 (1989) 17

Claire Oakes Finkelstein,
Duress: A Philosophical Account of the Defense in Law, 37 Ariz. L. Rev. 251 (1995)..17

No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term 2007

CHRISTOPHER MATTHEW BROWN,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

Petition for a Writ of Certiorari to the North Carolina Court of Appeals

---

Petitioner, Christopher Matthew Brown, was convicted of second degree murder, assault with a deadly weapon inflicting serious injury, and three traffic offenses arising out of an automobile accident. Despite the presentation of evidence that he acted under duress, the trial court refused to instruct on this defense. The North Carolina Court of Appeals rejected petitioner's constitutional challenge to the fairness of his trial based on the absence of an instruction on duress. [7A-9A] *See Taylor v.*

Kentucky, 436 U.S. 478, 490 (1978)(due process violated by refusal to give defendant's requested jury instruction). Petitioner respectfully asks this Court to issue a writ of certiorari to review the decision and resolve a division among the jurisdictions on the constitutional entitlement to an instruction on an affirmative defense that is supported by the evidence. *See State v. Riedl*, 15 Kan. App.2d 326, 329, 807 P.2d 697, 700 (1991)("The case law from other jurisdictions *overwhelmingly* supports the conclusion that the compulsion defense, or similar defenses, should be deemed applicable to traffic offenses which do not require proof of criminal intent.")(emphasis added)(citing cases from fourteen states); *see also Lannert v. Jones*, 321 F.3d 747 (8th Cir.), *cert. denied*, 540 U.S. 917 (2003); *United States ex rel. Peery v. Sielaff*, 615 F.2d 402 (7th Cir.), *cert. denied*, 446 U.S. 940 (1979). (cases requiring duress) *with* (cases not requiring duress)

OPINION BELOW

The opinion of the North Carolina Court of Appeals is published. *State v. Brown*, 646 S.E.2d 775 (N.C. App.), *disc. rev. denied*, 2007 WL 2156124 (N.C. 27 June 2007). [3A-12A]

JURISDICTION

The opinion of the North Carolina Court of Appeals was entered on 4 May 2007. [3A] Petitioner timely sought review in the Supreme Court of North Carolina, which was denied on 27 June 2007. [1A] Petitioner presented the federal constitutional claim that the trial court erred in denying his request for

an instruction on the defense of duress to both courts, where it was rejected on the merits. [6A-9A] This important question justifies review by this Court, whose jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AMENDMENT INVOLVED

U.S. Const. Amend. XIV:

> "[N]or shall any state deprive any person of life, liberty, or property without due process of law; nor deny to an person within its jurisdiction the equal protection of the laws."

STATE STATUTES INVOLVED

N.C. Gen. Stat. § 14-17: Murder in the first and second degree defined; punishment

> "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed during the perpetration or attempted perpetration of any [listed felony], shall be deemed to be murder in the first degree, ... All other kinds of murder . . . shall be deemed murder in the second degree . . . ."

N.C. Gen. Stat. § 14-32(b): Felonious assault with a deadly weapon with intent to kill or inflicting serious injury; punishments

> "Any person who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a Class E felon."

N.C. Gen. Stat. § 20-140(b): Reckless driving

> "Any person who drives any vehicle upon a highway or public vehicular area without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving."

N.C. Gen. Stat. § 20-141(3)(b): Unlawful racing on streets and highways

> "It shall be unlawful for any person to operate a motor vehicle on a street or highway willfully in speed competition with another motor vehicle. Any person violating the provisions of this subsection shall be guilty of a Class 2 misdemeanor."

N.C. Gen. Stat. § 20-146: Drive on right side of highway; exceptions

> "(a) Upon all highways of sufficient width a vehicle shall be driven upon the right half of the highway . . . ."

STATEMENT OF THE CASE

A. Procedural History

Christopher Matthew Brown was tried and convicted of second degree murder, speed competition, reckless driving to endanger persons or property, driving to the left of center, and assault with a deadly weapon inflicting serious injury. The trial court arrested judgment on speed competition, reckless driving to endanger persons or property, and driving to the left of center, and imposed a sentence of 157 months to 198 months for second degree murder and 25 months to 39 months for assault with a deadly weapon inflicting serious injury. [3A-4A] The North Carolina Court of Appeals affirmed the convictions, rejecting petitioner's claim that the failure to instruct the jury on the defense of duress, as he requested, violated his constitutional rights to a fair trial and due process. [6A-10A] The Supreme Court of North Carolina denied petitioner's timely request to review this decision. [1A]

B. Factual Background

Christopher Matthew Brown (hereinafter Matt), a sixteen-year-old, high school junior, was going home where he lived with his parents after an all-county band clinic. He was driving his parents' straight-drive truck, which he had only driven twice before as he had gotten his drivers license only six months earlier. A car pulled out in front of him. Matt slammed his brakes to avoid a collision. His truck started to stall and Nathaniel Clark (hereinafter Nathaniel), the eighteen-year-old driver

of the vehicle behind him, flipped Matt "the bird." [6A]

Matt continued up the hill with Nathaniel right on his bumper. Matt was frightened. After both boys passed some slower cars and Matt moved back into the right lane, Nathaniel got more upset and threw up his hands. He was less than a foot off Matt's bumper.

When Matt passed the car in front of him, he looked up and saw Nathaniel cutting through both two turning lanes and getting right on his bumper again. Matt was now so scared that he started trying to get away from Nathaniel. Matt panicked; he felt as scared as he had ever been in his life. He estimated traveling about sixty-five to seventy miles an hour in his effort to avoid Nathaniel.

When Matt started to pull back into the lefthand lane to make a turn to go home, Nathaniel jerked around him into traffic, increased his speed, and struck an oncoming car. The entire episode, from the first encounter between Matt and Nathaniel until the collision, was no more than a minute or a minute and a half.

Nathaniel admitted he became agitated and angry at Matt, pulled out early, and crossed the double yellow line. He was mad at Matt. At the second passing zone, Matt pulled out and passed a car in front of them, with Nathaniel tailing closely behind him. Nathaniel then cut to his right and started to pass Matt. Matt, having passed the car in front of him, moved into the right lane. However, rather than simply slow down and follow behind

Matt, Nathaniel moved to the left and sped up beside Matt's truck. At this point, the passing zone ended and the wreck occurred. Nathaniel admitted he was speeding at sixty-five or seventy miles per hour. In his statement to the police, however, he said he was "T'ing" Matt's truck, a "pit maneuver" in which he was pushing Matt's truck down the road with his truck. The police found pieces of tail light in the front of Nathaniel's car.

A witness spoke with both Matt and Nathaniel after the wreck. Matt acted like he was "scared" and said Nathaniel had been dogging him and trying to run him off the road. Nathaniel called Matt a "son of a bitch" who pulled out in front of him. Nathaniel was chuckling when he made the statement.

Tom Brooks, an expert in collision reconstruction, observed the physical evidence, interviewed witnesses, and corroborated the consistency of the witnesses' testimony. Brooks also reviewed the statement of a witness who said Nathaniel's truck was one foot behind Matt's truck. From the physical evidence and marks on the trucks, Brooks concluded Matt's truck and Nathaniel's truck had multiple contacts before the fatal collision. He opined that Matt's intention was to keep Nathaniel from passing him. [5A]

Brooks also found pieces of tail lights imbedded in the front tires of Nathaniel's truck. He concluded Nathaniel drove his truck into the rear of Matt's truck. Given the multiple marks, Brooks felt Nathaniel had hit the rear of Matt's truck "again and again to make multiple marks."

MANNER IN WHICH THE FEDERAL CONSTITUTIONAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner raised a due process challenge to the denial of his request for an instruction on the defense of duress to the charges of second degree murder, assault with a deadly weapon inflicting serious injury, willful speed competition, reckless driving to endanger, and driving left of center. His challenge was denied. He raised this federal constitutional claim in the North Carolina Court of Appeals, which rejected it on the merits. [6A-9A] He sought review of this issue in the Supreme Court of North Carolina. [1A] This claim has been fully litigated and decided on the merits below and is properly presented to this Court for review.

REASONS FOR GRANTING THE WRIT

THE TRIAL COURT'S REFUSAL TO GIVE PETITIONER'S REQUESTED JURY INSTRUCTION ON DURESS AS A DEFENSE TO UNINTENTIONAL MURDER AND SEVERAL UNDERLYING OFFENSES, WHERE BY SUBSTANTIAL EVIDENCE SHOWED THAT HE FEARED FOR HIS SAFETY WHEN HE EXCEEDED THE SPEED LIMIT AND DROVE RECKLESSLY, VIOLATED HIS DUE PROCESS RIGHT TO A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT.

This case presents an important constitutional issue in procedural and substantive respects. Procedurally, the issue involves the constitutional requirement that a defendant benefit from an

instruction on an affirmative defense. Substantively, the issue involves the availability of a duress defense to second degree murder, particularly where the charge is based on the violation of several motor vehicle laws (where alcohol was not involved) but no evidence even remotely suggests the defendant had an intent to kill anyone. The cases addressing this issue from other jurisdictions are contrary to the decision below. *See, e.g., State v. Riedl*, 15 Kan. App.2d 326, 807 P.2d 697 (1991) (applying duress defense to traffic offenses and leaving scene of accident); *State v. Messler*, 19 Conn. App. 432, 562 A.2d 1138 (1989) (duress defense applicable in speeding prosecution); *State v. Brown*, 306 Or. 399, 761 P.2d 1300 (1988) (duress defense applied in driving while license revoked case); *People v. Pena*, 149 Cal. App.3d Supp. 14, 197 Cal. Rptr. 264 (1983) (requiring duress defense for driving while impaired); *Browning v. State*, 31 Ala. App. 137, 13 So.2d 54 (1943) (requiring instruction on duress in reckless driving prosecution); *Brown v. State*, 227 Miss. 823, 87 So.2d 84 (1956) (requiring duress instruction where defendant drove recklessly and at excessive speed in fleeing law enforcement where no evidence police had warrant).

Moreover, the decision is contrary to *Taylor* and the teachings of numerous decisions of this Court. "[T]he trial court's refusal to give petitioner's requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment." *Taylor*, 436 U.S. at 490; *see California v. Trombetta*, 467 U.S. 479, 485 (1984)("Under the Due Process Clause of the

Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness"); *see also Crane v. Kentucky*, 476 U.S. 683, 690 (1986)(explaining defendant's constitutional right to due process means a fair opportunity to present and have the jury consider his defense). This Court should issue a writ of certiorari because the opinion below "is directly at odds with language in several of this Court's opinions," including *United States v. Bailey*, 444 U.S. 394, 409 (1980)(explaining contours of duress defense, citing Model Penal Code § 3.02(1)), as well as *Trombetta*, *Crane*, and *Taylor*, "and because it conflicts with the decisions of every other state court to have confronted this issue." *Crane*, 479 U.S. at 687 (explaining basis for issuing writ of certiorari).

Through both his own testimony as well as the observations of other people who saw portions of this unfortunate incident, petitioner presented evidence that he acted under duress. Nathaniel Clark frightened him by the way he acted and drove. Nathaniel tailgated him and made threatening gestures as he chased him along the highway. At least one witness who arrived immediately after the wreck described petitioner as "scared." Taken in a light most favorable to him, this evidence amply supported an instruction on duress.

But the court below held, without any analysis, that duress is not a defense to second degree murder. [7A] This holding reflects an antiquated view of the duress defense, especially where the killing is not done intentionally with a

deadly weapon, but results from an accident or negligent conduct.

Duress excuses "criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the law." *Bailey*, 444 U.S. at 409. *Bailey* referred approvingly to the Model Penal Code notion that the actor must believe that his commission of the crime is "necessary" to avoid a greater harm. *Id.* at 410 n.8 (citing Model Penal Code § 3.02(1)). "The compulsion may be by necessity, that is duress arising from circumstances, or by the application of duress on the defendant by another person." *Pena*, 149 Cal. App.3d Supp. at 22, 197 Cal. Rptr. at 269. Thus, if a reasonable person in petitioner's situation, where a person menacingly tailgated him in a way that amounted to a threat with a deadly weapon, would have feared death or serious bodily injury, his violation of the traffic laws would be under duress. *Browning*, 31 Ala. App. at 140, 13 So.2d at 56 (1943)(defendant entitled to duress instruction when fleeing unlawful threat or attack to save himself from feared injury; it is for jury to determine whether his flight (and excessive speed or reckless driving) was under duress and fear of death or grave physical harm).

Petitioner timely requested an instruction on duress on each of the charges, including second degree murder, assault with a deadly weapon inflicted serious injury, speed competition, reckless driving to endanger persons or property, and driving to the left of center. [7A, 30A] Petitioner also

specifically asked the trial court to instruct on duress with regard to the charges of assault with a deadly weapon inflicting serious injury, speed competition, reckless driving to endanger persons or property, and driving to the left of center. The trial court refused. Petitioner unsuccessfully challenged the constitutionality of this ruling on appeal. [7A-10A]

When a duress defense is supported by the evidence, as it was here, a defendant has a constitutionally protected right to an instruction on it. *Matthews v. United States*, 485 U.S. 58, 63 (1983); *see Stevenson v. United States*, 162 U.S. 313, 314-15 (1896); *see also Henderson v. Kibbe*, 431 U.S. 145, 154 (1977)(constitutional violation where lack of specific instruction impugns fairness of trial). A defense, such as duress, raised by the evidence is a substantial feature of the case, which requires an instruction from the trial court. The absence of a duress instruction "so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). Contrary to the ruling below, petitioner was entitled to an instruction that duress amounted to a defense on each of the underlying motor vehicle offenses, as *Riedl*, *Messler*, *Brown*, *Pena*, *Browning*, and *Brown* demonstrate.

The raison-d'etre for the rule requiring an instruction on a defense or a lesser included offense raised by the evidence is simple but profound. "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts

in favor of conviction." *Keeble v. United States*, 412 U.S. 205, 212 (1973); *see generally Beck v. Alabama*, 447 U.S. 625 (1980)(citing *Keeble* and explaining unconstitutionality of failing to provide jury with an option other than outright acquittal where evidence favorable to defendant supports lesser verdict); *accord Schad v. Arizona*, 501 U.S. 624 (1991). Duress excuses criminal conduct where the defendant was under an unlawful threat of imminent death or serious bodily injury, where the threat caused him to engage in conduct violating the literal terms of the law. *Bailey*, 444 U.S. at 409. "The compulsion may be by necessity, that is duress arising from circumstances, or by the application of duress on the defendant by another person." *Pena*, 149 Cal. App.3d Supp. at 22, 197 Cal. Rptr. at 269. Nathaniel's tailgating petitioner, in tandem with his threatening gestures and conduct, amounted to a threat with a deadly weapon that put petitioner in fear of death or serious bodily injury.

A defendant is entitled to an instruction on duress when he is fleeing an unlawful threat or attack to save himself from a feared injury. *See United States v. Gaudin*, 515 U.S. 506, 522-23 (1995)(rejecting tendered jury instruction on a defense tantamount to preventing jury from passing on element of offense, which is unconstitutional). "No matter what may be the shape compulsion takes, if it affects the person, and be yielded to bona fide, it is a legitimate defense." *Browning*, 31 Ala. App. at 140, 13 So.2d at 56. The defendant was driving lawfully when he came to a police barricade, at which point "he accelerated his speed in order (so he claims) to escape from the blowing sirens and

unlawful shots being fired at him." *Id.* *Browning* explained "it was for the jury to determine whether his flight (and excessive speed or reckless driving) was under duress and fear of death or grave physical harm." *Id.* at 141, 13 So.2d at 57. Likewise, where a defendant received a panicked call from a female friend to "come and get me and the kids" and proceeded to drive to her house despite having a suspended license, he was entitled to have his theory of the case presented the jury with a proper instruction on the defense of duress. *Brown*, 306 Or. at 604-09, 761 P.2d at 1304-07. Whether the defendant's belief was reasonable "must be a question for the jury if there is evidence in the record from which the jury could so conclude." *Id.* at 607, 761 P.2d at 1304. As in *Browning* and *Brown*, and taking the evidence in a light most favorable to petitioner, he believed it was necessary to drive away from the pursuing and threatening silver truck. The reasonableness of his belief under the circumstances was a question for the jury. Contrary to the analysis of the court below, the jury should have been instructed on the legal principle of duress in order to make this determination.

Riedl addressed the issue in the context of driving while impaired. The defendant contended the trial court erred in denying him an instruction on the defense of compulsion on charges of driving while impaired and failing to stop at a stop sign. The evidence, taken in a light most favorable to the defendant, showed defendant and a friend had been drinking at a bar. As they left, three people verbally threatened them. When the defendant reached for his keys, one of the men hit him. The defendant

sped away, attracting the attention of police officers five miles from the bar. He claimed he felt compelled to drive away, even impaired, and violating several traffic laws, because he had two friends who had been killed in bar fights. 15 Kan. App.2d at 328, 807 P.2d at 699. Indeed, as the Kansas court noted, "[t]he case law from other jurisdictions overwhelmingly supports the conclusion that the compulsion defense, or similar defenses, should be deemed applicable to traffic offenses which do not require proof of criminal intent." *Id.* at 329, 807 P.2d at 700.

Here, however, petitioner never had a reasonably safe opportunity to avoid Nathaniel's pursuit and threatening conduct and remove himself from the situation. From the moment Nathaniel ran up on his bumper and "flipped him the bird," there was no chance to turn off the main road. Nathaniel was constantly tailgating him, usually only a foot or so behind. He admitted to the police that he was "T'ing" petitioner's truck, which is a "pit maneuver" where he pushing petitioner's truck down the road with his truck. The police found pieces of tail light in the front of Nathaniel's car. Even the prosecution's own accident reconstruction expert, upon seeing pictures of pieces of tail lights imbedded in the front tires of Nathaniel's truck, examining the accident scene, and talking to various witnesses, concluded Nathaniel drove his truck into the rear of petitioner's truck. Given the multiple marks, he believed Nathaniel hit the rear of petitioner's truck "again and again to make multiple marks." Both were driving very fast during the entire incident that lasted only about a minute and a half. Indeed,

petitioner thought Nathaniel himself had turned off the road on which they were traveling, at which point he felt relieved. But Nathaniel had only veered into another lane. In fact, he shot across two lanes to run up on petitioner's bumper again. Given these facts, which must be taken in a light most favorable to the defense, petitioner had no legitimate, reasonable opportunity to remove himself from Nathaniel's threatening and frightening pursuit. At the very least, whether he had a sufficient opportunity to remove himself from the threat would be a matter for the jury. Thus, an instruction on duress was proper even on the charge of second degree murder and certainly on the underlying traffic offenses.

With regard to second degree murder generally, the lower court, without any analysis, simply asserted that duress is never a defense to murder. [7A] This holding is at odds with the views of a significant number of other jurisdictions. *See, e.g.*, *People v. Anderson*, 28 Cal.4th 767, 794, 50 P.2d 368, 385 (2002)(noting five states adopting the Model Penal Code provision allowing duress as a defense to homicide); *Commonwealth v. Allen*, 711 N.E.2d 657, 660-61 (Mass. 1999)(noting disagreement among states as to availability of duress defense to murder, but assuming it is available under clearly defined circumstances such as the absence of a specific intent to kill). The lower court's view reflects an antiquated view of the duress defense, especially where the killing is not done intentionally with a deadly weapon. The Model Penal Code allows a defendant to rely on the defense of duress against any criminal charge, including homicide. Model

Penal Code, § 2.09 (Comment 3 to section 2.09 noting "even homicide may sometimes be the product of coercion that is truly irresistible"). At the very least, the common law view should apply only when the homicide involves an intentional act with a specific intent to kill. "[T]he weight of scholarly commentary favors the Model Penal Code's definition of duress and its abolition of the common law murder exception to the duress defense." *Anderson*, 28 Cal.4th at 794, 50 P.2d at 385 (citing numerous articles); *see* Larry Alexander, *A Unified Excuse of Preemptive Self Protection*, 74 Notre Dame L. Rev. 1475 (1999); Claire Oakes Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 Ariz. L. Rev. 251 (1995); Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 So. Cal. L. Rev. 1331 (1989). Here, petitioner had no specific intent to harm anyone, and certainly had no intent to kill. He should have been able to rely on the defense of duress. The lower court's rejection of this defense to non-intentional homicide is contrary to the prevailing view among the jurisdictions, making it an issue worthy of resolution by this Court.

The lower court also erroneously held duress was inapplicable to assault with a deadly weapon inflicting serious injury, speed competition, reckless driving to endanger persons or property, and driving to the left of center. [7A-10A] But every other court considering this issue has concluded duress is a defense to each of these charges. *See Riedl*, 15 Kan. App.2d 326, 807 P.2d 697; *Messler*, 19 Conn. App. 432, 562 A.2d 1138; *Brown*, 306 Or. 399, 761 P.2d 1300; *Pena*, 149 Cal. App.3d Supp. 14, 197 Cal. Rptr.

264; *Browning*, 31 Ala. App. 137, 13 So.2d 54; *Brown*, 227 Miss. 823, 87 So.2d 84. Moreover, because speed competition, reckless driving to endanger persons or property, and driving to the left of center were each elements of second degree murder in this case, petitioner was entitled to instructions on duress with respect to them as elements of second degree murder.

Petitioner never had a reasonable chance to avoid Nathaniel's threatening conduct and avoid the incident. There was no legitimate chance to turn off the road as Nathaniel constantly kept within a foot of his bumper with both cars going nearly seventy miles an hour in an incident that lasted only about a minute. At the very least, whether he had a sufficient opportunity to remove himself from the threat would be a matter for the jury. "It was the duty of the court to safeguard petitioner's rights, a duty only it could have performed reliably." *Taylor*, 436 U.S. at 489. But the court failed in its responsibility.

There now exists a serious conflict in the law regarding the availability of a duress defense for a situation where a defendant causes someone's death without an intent to kill and for non-homicide offenses. Indeed, the overwhelming majority of states have decided this constitutional issue contrary to the ruling of the lower court. This Court should issue a writ of certiorari to resolve the conflict among the states on this important constitutional question.

CONCLUSION

For the reasons stated herein, Christopher Matthew Brown respectfully requests that this Court grant a writ of certiorari to review the decision below and resolve the dispute among the jurisdictions on the important constitutional question regarding the right to a jury instruction on a defense.

Respectfully submitted,

M. Gordon Widenhouse, Jr.
Counsel of Record
RUDOLF WIDENHOUSE & FIALKO
312 West Franklin Street
Chapel Hill, NC 27516
(919) 967-4900

David G. Belser
BELSER & PARKE, P.A.
Post Office Box 1076
Asheville, NC 28802
(828) 258-1500

No. 171P07 TWENTY-EIGHTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

(State v Christopher M. Brown)

STATE OF NORTH CAROLINA

v

CHRISTOPHER MATTHEW BROWN

From NC Court of Appeals
(06-396)
From Buncombe
(03CRS51017, 03CRS51018, 03CRS51019)

[ENTERED: July 2, 2007]

****

ORDER

Upon consideration of the petition filed on the 10th day of April 2007 by Defendant in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

> **"Denied by order of the Court in conference, this the 27th day of June 2007.**
>
> **s/ Hudson, J.**
> **For the Court"**

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 2nd day of July 2007.

Christie Speir Cameron
Clerk, Supreme Court of
North Carolina

s/ Shaula A.Brannan
Assistant Clerk

Copy to:
North Carolina Court of Appeals
Mr. Ralph A. White, Appellate Reporter (By E-Mail)
Mr. M Gordon Widenhouse, Jr., Attorney at Law,
For Christopher Matthew Brown (by E-Mail)
Mr. Issac T. Avery, III, Senior Deputy Attorney General, For State of NC (by E-Mail)
Mr. Ronald L. Moore, District Attorney
Mr. Robert H. Christy, Jr., Clerk of Superior Court
West Publishing Company (By E-mail)
Lexis-Nexis (By E-mail)
LOIS Law (By E-mail)

No. COA06-396

NORTH CAROLINA COURT OF APPEALS

Filed: 6 March 2007

[ENTERED: March 6, 2007]

STATE OF NORTH CAROLINA

v.

CHRISTOPHER MATTHEW BROWN

Buncombe County
No. 03CRS51017-19; 05CRS4883

Appeal by defendant from judgment entered 2 September 2005 by Judge Zoro J. Guice, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 8 January 2007.

Roy Cooper, Attorney General, by Special Counsel Isaac T. Avery, III, For the State.

Belser & Parke, P.A., by David G. Belser, and Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellant.

MARTIN, Chief Judge.

Defendant appeals from a judgment entered upon his conviction by a jury of second degree murder, assault with a deadly weapon inflicting serious injury, willful speed competition, reckless driving and driving left of center. The trial court arrested judgment on the latter three charges and

imposed a sentence of 157 months to 198 months for second degree murder and a concurrent sentence of 25 months to 39 months for assault with a deadly weapon inflicting serious injury. We find no error.

The State's evidence at trial tended to show that on 10 January 2003, defendant was traveling westbound on Highway 19/23 in a white Ford Ranger pick-up truck. Immediately past the intersection of 19/23 and Highway 151, defendant's truck pulled in front of a silver Ford Ranger truck driven by Nathan Clark ("Clark"). Neither defendant nor Clark knew each other before 10 January. Highway 19/23 becomes a two lane paved road running between Asheville and Canton with periodic half-mile passing lanes opening up in both directions. Both trucks moved into a passing lane as a car in front of them started to turn. Clark then tried to pass defendant on the right. Defendant merged back into the right lane despite the fact that Clark had pulled halfway beside defendant's truck. The two trucks approached a green Jeep just as a second passing lane opened up. Both trucks passed the Jeep. For a second time, Clark tried to pass defendant on the right. Defendant pulled in front of Clark and began driving down the middle of both lanes. Clark merged back into the passing lane and pulled along the side of defendant's truck. The two trucks proceeded close to one another and made contact. The passing lane ended and Clark's truck struck a 1996 Grand Marquis driven by Ed Mehaffey, and also occupied by a passenger, Margaret Hill. Defendant's car went off the right side of the road. Mehaffey was killed and Hill and Clark were seriously injured.

Joseph Stanley ("Stanley") testified that he saw both trucks heading westbound roughly a quarter of a mile before the accident. Stanley was driving eastbound with his window down. From the trucks, he heard "A motor racing up back and forth" and "[m]ashing on the accelerator and letting up." He observed defendant making hand gestures and described the behavior of both trucks as "antagonizing racing." Houston Sullivan ("Sullivan") was traveling eastbound on Highway 19/23 directly behind Mehaffey. Immediately before the accident, Sullivan observed the two trucks traveling next to one another as the passing lane began to end. Sullivan opined that both trucks were exceeding the speed limit. Sullivan stated that Clark was ultimately forced into oncoming traffic. A paramedic with the Buncombe County EMS spoke with defendant shortly after the accident. Defendant indicated that he slowed his truck down as a reaction to Clark riding too close from behind. Clark then attempted to pass and the defendant admitted that he sped up. The two trucks bumped into each other, and then the accident occurred.

Tom Brooks, certified as an expert in collision reconstruction, testified to the physical evidence and corroborated the consistency of the witnesses' statements. The two trucks struck one another multiple times in the seconds leading up to the collision. The vehicles were traveling approximately seventy miles per hour. Brooks expressed his opinion that Clark was attempting to avoid the eastbound traffic lane and defendant's actions were preventing him from doing so.

Defendant presented evidence tending to show he first pulled in front of Clark's silver truck near the intersection of Highway 12/23 and Highway 151. A car then pulled in front of defendant and forced him to brake suddenly. Defendant saw Clark waive an obscene hand gesture at him. Clark proceeded to follow defendant at a distance that was less than one-half of a car length. Clark continued to follow defendant as he passed a green jeep. At this point, defendant testified he was panicking and that he was more scared than he had ever been. After passing the Jeep, defendant tried to move to the right lane and Clark continued closely behind. Defendant then decided to move back to the left lane and to turn onto Fairmont Road toward his grandparents' house. Clark then drove up alongside of defendant and hit an oncoming car. Defendant did not recall the two trucks striking one another before the accident

---

Defendant assigns error to the trial court's refusal to instruct the jury on the affirmative defense of duress for all charges. A trial court must give a requested instruction if it is a correct statement of the law and supported by the evidence. *Roberts v. Young*, 120 N.C. App. 720, 726, 464 S.E.2d 78, 83 (1995). "Any defense raised by the evidence is deemed a substantial feature of the case and requires an instruction." *State v. Hudgins*, 167 N.C. App. 705, 708, 606 S.E.2d 443, 446 (2005) (citation omitted). For a particular defense to result in a required instruction, there must be substantial evidence of each element of the defense when

viewing the evidence in a light most favorable to the defendant. *State v. Ferguson*, 140 N.C. App. 699, 706, 538 S.E.2d 217, 222 (2000) "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (quoting *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)).

Defendant requested the following instruction:

> There is evidence in this case tending to show that the defendant acted only because of [duress]. The burden of proving [duress] is upon the defendant. It need not be proved beyond a reasonable doubt, but only to your satisfaction. The defendant would not be guilty of this crime if his actions were caused by a reasonable fear that he (or another) would suffer immediate death or serious bodily injury if he did not commit the crime. His assertion of [duress] is a denial that he committed any crime. The burden remains on the State to prove the defendant's guilt beyond a reasonable doubt.

N.C.P.I Crim. 310.10. The defense of duress is not applicable to defendant's second degree murder charge. *See State v. Smarr*, 146 N.C. App. 44, 54, 551 S.E.2d 881, 888 (2001). As to the remaining charges, a defendant would have to show that the duress was "present, imminent or impending" and that any reactionary action was taken based on a "well-grounded apprehension of death or serious bodily harm." *State v. Kearns*, 27 N.C. App. 354, 357. 219

S.E.2d 228, 230-31 (1975). Duress, however, "cannot be invoked as an excuse by one who had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm." *Id.*, 219 S.E.2d at 231. There must be evidence supporting each element of duress for the trial court to instruct the jury on that defense. *Smarr*, 146 N.C. App. at 55, 551 S.E.2d at 888.

Relying on *State v. Borland*, 21 N.C. App. 559, 205 S.E.2d 340 (1974), defendant argues that he was entitled to an instruction on duress for each of the motor vehicle offenses for which he was convicted. In *Borland*, the defendant attempted to evade an unmarked car that, unbeknownst to him, was occupied by a deputy sheriff and a recent arrestee. *Id.* at 561-62, 205 S.E.2d at 342-43. An instruction on duress was deemed necessary based on evidence that the unmarked car pulled up on defendant's bumper, flashed the high beams, honked the horn and fired off three rounds from a revolver. *Id.* at 561, 205 S.E.2d at 342. The court found defendant had "reasonable grounds to fear for his safety." *Id.* at 566, 205 S.E.2d at 345.

Even when considering the evidence in a light most favorable to the defendant, the record does not support a jury instruction on duress. First, the evidence does not show the existence of a situation which warranted in defendant a "well-grounded apprehension of death or serious bodily harm." *Kearns,* 27 N.C. App. at 357, 219 S.E.2d at 230-31. Here, defendant testified that he pulled in front of Clark's truck. In response, Clark used an obscene hand gesture, appeared upset and drove to within

one-half of a car length of defendant's bumper. Defendant noticed that Clark was much bigger than he was. Clark continued down the road following closely and driving erratically. Clark's behavior lacked the reasonable threat of imminent death or serious injury that was present in *Borland* and that would be necessary to excuse defendant's actions. "Apprehension of loss of property, or of slight or remote personal injury, is no excuse." *Borland*, 21 N.C. App. at 564, 205 S.E.2d at 344 (citation omitted).

Second, defendant had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm. The evidence, considered in defendant's favor, shows that he had ample opportunity to either maintain a safe speed or to pull over off the highway. Upon realizing that Clark had not turned off the highway, defendant "lost all train of thought and just started running from him." The prosecutor questioned defendant about his speed on the fifty-five mile per hour road immediately before the accident.

> Q: And prior to any point in time of this what Trooper Brooks calls as the area of impact, you were driving proper? You had not done anything illegal?
>
> A: I went over the speed limit.
>
> Q: Witnesses said you were going over seventy miles an hour at least. Is that fair to say?
>
> A: I would say sixty-five to seventy.

Defendant controlled his own vehicle and could have avoided speeding or reckless driving. Furthermore, defendant had multiple opportunities to pull his truck over prior to the accident. Defendant could have turned left on Indian Branch Road, left on Chandler Heights Road or right on Indian Branch Road. Defendant admitted that he would pull his truck over if he were put in the same situation a second time. Based on the evidence, the trial court was under no duty to charge the jury on duress.

Defendant next contends that two statements admitted during trial were improper opinion testimony as to the intention of another person on a particular occasion. Defendant first challenges testimony of the State's accident reconstruction expert, Tom Brooks. Brooks was asked his opinion as to whether Clark "was trying to get out of the way of oncoming traffic" immediately before the accident. Defendant's objection was overruled. Brooks responded with a "yes" and indicated that his opinion was based on statements made by Clark as well as the physical evidence.

The trial court is given a wide latitude of discretion when determining the admissibility of expert testimony. *State* v. *Knox*, 78 N.C. App. 493, 495, 337 S.E.2d 154, 156 (1985). An expert may give an opinion, provided it will assist the trier of fact to understand the evidence or to determine a fact in issue. *State* v. *Purdie*, 93 N.C. App. 269, 275, 377 S.E.2d 789, 792 (1989). Expert opinion is inadmissible "if it is impossible for anyone, expert or nonexpert, to draw a particular inference from the evidence." *Id.* at 275, 377 S.E.2d at 792.

The trial court found Brooks to be qualified in the field of accident reconstruction. To arrive at his challenged opinion, Brooks employed methods that have been found to be reliable, such as a review of both the physical evidence and witness testimony. *See Purdie*, 93 N.C. App. at 276, 377 S.E.2d at 793. As an accident reconstruction expert, Brooks was more qualified than the trier of fact to assess whether Clark was trying to avoid oncoming traffic immediately before the accident. His opinion that Clark, "was trying to get out of that traffic" is a reasonable inference drawn from the evidence and could reasonably be considered of assistance to the trier of fact. Defendant, therefore, has not shown that the trial court abused its discretion by admitting the evidence.

In addition, defendant challenges a portion of Houston Sullivan's testimony as improper opinion evidence. Sullivan was asked what he meant in his statement to the highway patrol where it read "the lane merged into one lane" and "[t]he white truck was in the right lane forcing the other truck into oncoming traffic." Sullivan clarified his statement by stating that "[h]is [Clark's] lane was ending" and "he was trying to force his way back over, and he was forced to take the path that he was on." Defendant did not object at trial, and we proceed under plain error review.

Before engaging in a plain error analysis, it must first be determined whether the trial court's action constituted error. *State v. Duff*, 171 N.C. App. 662, 669-70, 615 S.E.2d 373, 379 (2005) (citations omitted). "Opinion evidence is always admissible

when the facts on which the opinion or conclusion is based cannot be so described that the jury will understand them sufficiently to be able to draw their own inferences." *State v. Workman*, 344 N.C. 482, 510, 476 S.E.2d 301, 316 (1996) (citations omitted). Such testimony is known as a shorthand statement of fact and has been upheld regardless of whether the statement appears to be an opinion. *See State* v. *Hunt*, 325 N.C. 187, 193, 381 S.E.2d 453, 457 (1989) (upholding witness testimony that the defendant reacted to certain incriminating remarks with "a long glance like [his co-conspirator] better shut up."). *See also State* v. *Dawson*, 278 N.C. 351, 357, 180 S.E.2d 140, 144 (1971) (upholding witness testimony that defendant "seemed to be joking" as a shorthand statement of fact). The admission of the statement at issue was not error, plain or otherwise.

No error.

Judges McCULLOUGH and LEVINSON concur.

* * *

JUDGE GUICE'S CHARGE TO THE JURY:

Members of the jury, all of the evidence has been presented. It is now your duty to decide from this evidence what the facts are. You must then apply the law which I'm about to give you to those facts. It is absolutely necessary that you understand and apply the law as I give it to you and not as you think it is or as you might like it to be. This is important because justice requires that everyone tried for the same crime be treated in the same way and have the same law applied to him.

The defendant has entered pleas of "not guilty." The fact that he has been indicted is no evidence of guilt. Under our system of justice, when a defendant pleads "not guilty" he is not required to prove his innocence. He is presumed to be innocent. The State must prove to you that the defendant is guilty beyond a reasonable doubt.

A reasonable doubt is a doubt based on reason and common sense arising out of some or all of the evidence that has been presented, or the lack or insufficiency of the evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt.

You are the sole judges of the credibility of each witness. You must decide for yourselves whether to believe the testimony of any witness. You may believe all or any part or none of what a witness has said on the witness stand. In determining

whether to believe any witness you should apply the same tests of truthfulness which you apply in your everyday affairs. As applied to this trial these tests may include the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, the manner and appearance of the witness, any interest, bias or prejudice the witness may have, the apparent understanding and fairness of the witness, whether the testimony of the witness is reasonable and whether the testimony of the witness is consistent with other believable evidence in the case.

You are the sole judges of the weight to be given any evidence. By this I mean if you decide that certain evidence is believable, you must then determine the importance of that evidence in light of all other believable evidence in the case.

Now, ladies and gentlemen of the jury, there are two types of evidence from which you may find the truth as to the facts of the case: direct evidence and circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. Circumstantial evidence is proof of a chain or group of facts and circumstances indicating the guilt or innocence of a defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all of the evidence in these cases. After weighing all of the evidence, if you're not convinced of the guilt of the defendant

beyond a reasonable doubt you must find him not guilty.

Now, members of the jury, you may find that a witness is interested in the outcome of this trial. In deciding whether or not to believe such a witness you may take the interest of the witness into account. If, after doing so, you believe the testimony of the witness in whole or in part, you should treat what you believe the same as any other believable evidence.

Now, members of the jury, in this case you have heard evidence from a witness who has testified and expressed opinions. A witness is permitted to testify in the form of an opinion in a field where he purports to have specialized skill or knowledge. As I have instructed you, you are the sole judges of the credibility of each witness and the weight to be given to the testimony of each witness. In making this determination as to the testimony of a witness who has expressed opinions you should consider, in addition to the other tests of credibility and weight, the witness's training, qualifications and experience, or the lack thereof, the reasons, if any given, for the opinion, whether the opinion is supported by facts that you find from the evidence, whether the opinion is reasonable, and whether the opinion is consistent with other believable evidence in the case.

You should consider the opinion of a witness who has been allowed to express it, but you're not bound by it. In other words, you're not required to accept a witness's opinion to the exclusion of the

facts and circumstances disclosed by other testimony.

Members of the jury, when evidence has been received from a witness in the form of an opinion, you may only consider the opinion of a witness which is rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Ladies and gentlemen, when evidence has been received tending to show that at an earlier time a witness made a statement which may be consistent or may conflict with the testimony of the witness at this trial, you must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe that such earlier statement was made and that it is consistent or does conflict with the testimony of the witness at this trial, then you may consider this together with all other facts and circumstances bearing upon the witness's truthfulness in deciding whether you will believe or disbelieve the testimony of the witness at this trial.

Members of the jury, when evidence has been received tending to show that a witness has been convicted of a criminal charge, you may consider this evidence for one purpose only. If, considering the nature of the crime or crimes you believe that this bears on truthfulness, then you may consider it together with all other facts and circumstances bearing upon the witness's truthfulness in deciding whether you will believe or disbelieve the testimony of the witness at this trial. Except as it may bear on

this decision, this evidence may not be considered by you in your determination of any fact in this case.

Now, ladies and gentlemen of the jury, the defendant has been charged with assault with a deadly weapon inflicting serious injury. For you to find the defendant guilty of this offense the State must prove three things beyond a reasonable doubt. First, that the defendant assaulted the victim, Margaret Hill, by operating his motor vehicle in a manner such that it constituted a deadly weapon, and that he did this intentionally. Second, that the defendant used a deadly weapon. A deadly weapon is a weapon which is likely to cause death or serious bodily injury. A motor vehicle can be a deadly weapon. And in determining whether the motor vehicle was a deadly weapon, you should consider the nature of the motor vehicle and the manner in which it was used or operated.

Now, members of the jury, a driver who operates a motor vehicle in a manner such that it constitutes a deadly weapon, thereby proximately causing serious injury to another, may be convicted of assault with a deadly weapon inflicting serious injury provided there is either an actual intent to inflict injury or culpable or criminal negligence from which such intent may be implied. Culpable or criminal negligence is such recklessness or carelessness proximately resulting in injury or death as imports a thoughtless disregard of consequence or heedless indifference to the safety and rights of others. And thirdly, the State must prove that the defendant inflicted serious injury upon the victim.

Now, members of the jury, if you find from the evidence and beyond a reasonable doubt that on or about the alleged date the defendant intentionally assaulted the victim, Margaret Hill, by intentionally operating his motor vehicle in a manner such that it constituted a deadly weapon, and that the motor vehicle was a deadly weapon thereby inflicting serious injury upon the victim, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Now, members of the jury, the defendant has been accused of second-degree murder. Under the law and the evidence in this case, it is your duty to return one of the following verdicts: guilty of second-degree murder or guilty of involuntary manslaughter or guilty of misdemeanor death by vehicle or not guilty. Second-degree murder is the unlawful killing of a human being with malice. Involuntary manslaughter is the unlawful, unintentional killing of a human being by an act done in a culpably-negligent way misdemeanor death by vehicle is the unintentional killing of a human being which is proximately cause by the violation of any law or ordinance governing the operation of motor vehicles. I charge that for you to find the defendant guilty of second-degree murder the State must prove six things beyond a reasonable doubt. First, that the defendant was driving a vehicle on a highway o f the state of North Carolina. Second, that while the vehicle was being operated by the defendant the motor vehicle was involved in an accident or collision. Thirdly, that a person was killed in this

accident or collision. Fourthly, that the defendant violated the following law or laws of this state governing the operation of motor vehicles. The laws of this state make it unlawful to engage in speed competition on a highway or to operate a motor vehicle by failing to drive that motor vehicle on the right half of the highway that was of sufficient width for more than one lane of travel, or to operate a motor vehicle without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property. The court will define these laws and give their elements to you later in this charge. Fifthly, that the defendant acted unlawfully and with malice. Malice is a necessary element which distinguishes second-degree murder from manslaughter. Malice arises when an act which is inherently dangerous to human life is intentionally done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief. The court instructs you that the term "deliberately bent on mischief" connotes conduct as exhibits conscious indifference to consequences wherein probability of harm to another within the circumference of such conduct is reasonably apparent, though no harm to such other is intended. It connotes an entire absence of care for the safety of others which exhibits indifferences to consequences. It connotes conduct where the actor, having reason to believe his action may injure another, does it being indifferent to whether it injures or not. It indicates a realization of the imminence of danger and reckless disreard, completely indifferent and unconcerned for probable consequences. It connotes conduct where the actor is

conscious of his conduct and conscious of his knowledge of the existing conditions that injury would probably result, and that with reckless indifference to consequences that actor consciously and intentionally did some wrongful act to produce injurious result. And sixthly, the State must prove that the death of the victim was proximately caused by the unlawful act or acts of the defendant done in a malicious manner. A proximate cause is a real cause without which the victim's death would not have occurred. The defendant's act or acts need not have been the last or nearest cause. It is sufficient if they concurred with some other cause acting at the same time which, in combination with it, proximately caused the victim's death.

If you do not find the defendant guilty of second-degree murder, you must consider whether he is guilty of involuntary manslaughter. Involuntary manslaughter is the unlawful, unintentional killing of a human being by an act done in a culpably-negligent way. For you to find the defendant guilty of involuntary manslaughter the state must prove two things beyond a reasonable doubt. First, that the defendant violated a traffic law or laws as heretofore stated in the fourth element of the charge on second-degree murder. That the defendant's violation of laws or law governing the operation of a motor vehicle constituted culpable negligence. Such violation will constitute culpable negligence if the violation is willful, wanton or intentional, but where there is an unintentional or inadvertent violation of law, such violation standing alone does not constitute culpable negligence. To constitute culpable negligence, the inadvertent or

unintentional violation of the law must be accompanied by reckless or probable consequences of a dangerous nature when tested by the rule of reasonable foresight amounting altogether to a thoughtless disregard of consequences or a heedless indifference to the safety of others. And second, that the defendant's culpable negligence proximately caused the victim's death.

If you do not find the defendant guilty of involuntary manslaughter, you must consider whether he is guilty of misdemeanor death by vehicle. Misdemeanor death by vehicle differs from involuntary manslaughter in that the State need not prove that the defendant was culpably negligent, only that his violation of other law or laws governing the operation of motor vehicles proximately caused the victim's death.

So, ladies and gentlemen, the court charges that if you find, from the evidence and beyond a reasonable doubt, that on or about the alleged date the defendant drove a vehicle on a highway and that when he did so, he violated one or more of the following laws – to wit, engaging in speed competition on a highway or operating a motor vehicle and failing to drive that motor vehicle on the right half of the highway that was of sufficient width for more than one lane of travel or by operating a motor vehicle without due caution and circumspection and at a speed or in a manner so as to engager or be likely to endanger any person or property, and that the defendant acted unintentionally and so recklessly and wantonly as to manifest in a mind utterly without regard for human

life and social duty and deliberately bend on mischief, and that this conduct constituted malice, and that such conduct proximately caused the death of the victim, it would be your duty to return a verdict of "guilty of second-degree murder." However, if you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of "guilty of second-degree murder."

You must then determine whether the defendant is guilty of involuntary manslaughter. If you find from the evidence and beyond a reasonable doubt that on or about the alleged date the defendant drove a motor vehicle on a highway and violated one or more of the traffic laws of North Carolina- to wit, engaging in speed competition on a highway or operating a motor vehicle and failing to drive that motor vehicle on the right half of the highway that was of sufficient width for more than one lane of travel, or by operating a motor vehicle without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property – well – any person or property, and that such violation proximately caused the death of the victim, it would be your duty to return a verdict of "guilty of misdemeanor death by vehicle." However, if you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of "not guilty."

Now, ladies and gentlemen of the jury, the defendant has been accused of reckless driving. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable

doubt. First, that the defendant drove a vehicle upon a highway. Members of the jury, highway 19/23 is a highway. And second, that he drove that vehicle by exceeding the speed limit, not remaining in his lane of travel and having contact with another vehicle, and that in so doing, he acted without due caution and circumspection. And third, that he drove at a speed or in a manner so as to endanger or be likely to endanger any person or property.

Now, members of the jury, if you find from the evidence and beyond a reasonable doubt that on or about the alleged date the defendant drove a vehicle upon a highway by exceeding the speed limit, not remaining in his lane of travel and having contact with another vehicle, and that in so doing he acted without due caution or circumspection and drove at a speed or in a manner so as to endanger or be likely to endanger any person or property, it would be your duty to return a verdict of "guilty." If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of "not guilty."

Now, members of the jury, the defendant has been accused or charged with willfully engaging in a speed competition on a street or highway. For you to find the defendant guilty of this offense the State must prove three things beyond a reasonable doubt. First, that the defendant, while operating a motor vehicle, engaged in a speed competition with another vehicle. Secondly, that this speed competition occurred on a street or highway. And third, that the defendant acted willfully. If you find from the evidence and beyond a reasonable doubt that on or

about the alleged date the defendant, while operating a motor vehicle, willfully engaged in a speed competition with another motor vehicle on a street or highway it would be your duty to return a verdict of "guilty." If you do not so find or if you have a reasonable doubt as to one or more of these things it would be your duty to return a verdict of "not guilty."

Now, members of the jury, the defendant has been charged with failing to drive his motor vehicle on the right half of the highway that was of sufficient width for more than one lane of travel. For you to find the defendant responsible for this infraction the State must prove three things beyond a reasonable doubt. First, that the defendant was the driver of the vehicle. Second, that this vehicle was on a highway. And third, that the defendant failed to drive the vehicle on the right half of the highway that was of sufficient width for more than one lane of travel. If you find from the evidence and beyond a reasonable doubt that on or about the alleged date the defendant was the driver of a vehicle that was on a highway and that the defendant failed to drive the vehicle on the right half of the highway that was of sufficient width for more than one lane of travel, it would be your duty to return a verdict of "responsible." If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of "not responsible."

Now, members of the jury, you have heard the evidence and the arguments of counsel. If your recollection of the evidence differs from that of the

prosecuting attorneys or the defense attorneys, you are to rely solely upon your own recollection. It is your duty to remember the evidence whether it has been called to your attention or not. You should consider all of the evidence, the arguments, the contentions and positions urged by the attorneys and any other contention that arises from the evidence and, using your common sense, you must determine truth in these cases.

Now, members of the jury, the highest aim of every legal contest is the ascertainment of truth. Somewhere within the facts of every case the truth abides, and where truth abides, justice steps in, garbed in its robes, and tips the scales. In this case you have no friend to reward, no enemy to punish, no anger to appease or sorrow to assuage. Yours is the solemn duty to let your verdict speak the everlasting truth.

Ladies and gentlemen of the jury, as the presiding judge I am required by the law to be impartial. You should not mistakenly infer that I have implied that any of the evidence should be believed or disbelieved, that a fact has been proved or has not been proved, or as to what your findings ought to be. Instead, you and you alone are to find the facts and to render verdicts reflecting the truth.

Members of the jury, you may not return a verdict until all twelve jurors agree unanimously as to what your verdicts shall be. You may not return or render a verdict by a majority vote.

The procedure that you will follow is that once you have arrived at your unanimous verdict in each

of the cases your foreperson will indicate what that verdict is on the jury forms that you're going to be submitted, and I'll go over those with you in a minute. But once you have arrived at your unanimous verdict and the foreperson has recorded that verdict on the respective forms and you've done that as to each of these cases, please knock on the door to the jury room, let the bailiff know that and then we'll have you brought back to this courtroom to pronounce that verdict.

Now, ladies and gentlemen of the jury, the Court recommends that when you get to your jury room that you select one of your members to serve as your foreperson and to lead you during the course of your deliberations. Once you have selected your foreperson, please knock on the door to the jury room, let the bailiff know that. He will then deliver to you these written verdict forms and you may then begin your verdict deliberations. Do not begin your verdict deliberations until you have received these written verdict forms from the bailiff.

Now, ladies and gentlemen of the jury, you will note that there is a verdict form for each of the cases. In 05-CRS-4883, which is the case involving the prosecuting witness Margaret Hill, you will note that there are two alternatives, and you will also note the heading of the case at the top and this language: "We the jury, unanimously find the defendant, Christopher Brown," and as I said, two alternatives. First, "guilty of assault with a deadly weapon inflicting serious injury" or "not guilty." Each of these alternatives is preceded by a parenthesis, so when the jury arrives at its

unanimous verdict, the foreperson will record that verdict by making an "x" mark or a check mark in the appropriate parenthesis. The foreperson will then date and sign this verdict sheet.

Now, you'll note that each of the verdict sheets follow the same format, and in the case of 03-CRS-51017 you'll note that there are four alternatives: "guilty of second-degree murder" or "guilty of involuntary manslaughter" or "guilty of misdemeanor death by a motor vehicle" or "not guilty." In 03-CRS-51019 you will note that there are two alternatives: "guilty of reckless driving" or "not guilty." And in 03-CRS-51018 you will note that there are two alternatives, "guilty of speed competition" or "not guilty." And in 04-CRS-2129 you'll note that there are two alternatives: "responsible for failing to operate his motor vehicle upon the right half of the highway that was of sufficient width for more than one lane of travel" or "not responsible."

Now, could I have counsel approach the bench?

(All counsel approached the bench.)

COURT: Ladies and gentlemen of the jury, the Court has noted that some of you during the course of this trial have been taking notes, and the court would instruct you that when you begin your deliberations you may use your notes to help refresh your memory as to what was said in court. However, the Court would caution you that you're not to give your notes or the notes of any other juror any undue significance. While taking notes, a juror may fail to hear important portions of testimony. Any notes

taken by you are not to be considered as evidence in this case. Your notes are not an official transcript of the trial, and for that reason you must remember that in your jury deliberations notes are not entitled to any greater weight than the individual recollections of all of the other jurors. So the Court wanted to give you that instruction inasmuch as you have been permitted to take notes during the course of this trial.

Now, if I could ask you all to come up here one more time.

(All counsel approached the bench.)

All right, ladies and gentlemen, one further instruction. There has been evidence received during the course of this trial dealing with the character or the reputation of the defendant for truthfulness. The court would instruct you that you may consider this evidence for one purpose only. If you believe all or any part of this evidence and find that it bears upon the defendant's truthfulness, you may consider it together with all other facts and circumstances bearing upon the defendant's truthfulness in deciding whether you will believe or disbelieve the testimony of the defendant at this trial. Except as it may bear on this decision, this evidence may not be considered by you in your determination of any other fact in this case.

All right. With that, ladies and gentlemen of the jury, I'm going to let you now retire to your jury room. The twelve of you, and select your foreperson. I'm also going to give the verdict sheets to the bailiff. When you have selected your foreperson, knock on

the door to the jury room. The bailiff will then deliver to you these written verdict sheets and you may then begin your verdict deliberations. So you twelve may now retire to the jury room and select your foreperson.

You've been given a number of exhibits during the course of this trial. At this particular time let me ask you to leave all of that in your chairs. Those of you who took notes, you may take your notes and follow the instructions I've given you with respect to your notes, but all of the other exhibits, you'll leave those in your chairs.

JUROR: Some of us have been taking notes on these papers.

MR. HASTY: The State does not object to them taking the materials back.

MR. THORTON: No problem.

COURT: Those of you who have taken notes on your exhibits may take that with you.

(Jury left the courtroom at 10:13 a.m. and the proceedings continued out of their presence as follows:)

COURT: Now, to the three alternate jurors, there

* * *

REQUESTED INSTRUCTION ON DURESS

[Entered: September 1, 2005]

Petitioner requested the trial court to instruct the jury on the defense of duress, pursuant to North Carolina Pattern Jury Instruction 310.10, as follows:

> There is evidence in this case tending to show that the defendant acted only because of duress. The burden of proving duress is upon the defendant. It need not be proved beyond a reasonable doubt, but only to your satisfaction. The defendant would not be guilty of this crime if his actions were caused by a reasonable fear that he would suffer immediate death or serious bodily injury if he did not commit the crime. His assertion of duress is a denial that he committed any crime. The burden remains on the state to prove the defendant's guilt beyond a reasonable doubt.

The trial court refused to give this requested instruction.